STATE OF MICHIGAN

COURT OF APPEALS

UNITED SERVICES AUTOMOBILE ASSOCIATION, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED April 19, 2012
v CHARLES RIMBEY and TERRY PARK, co-guardians of RANA REYES, a Legally Incapacitated Person, Defendants-Appellees, and SPECTRUM HEALTH HOSPITALS and SPECTRUM HEALTH CONTINUING CARE, Defendants/Counter-Plaintiffs-Appellees.	No. 299307 Ottawa Circuit Court LC No. 09-001140-NF

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Plaintiff/counter-defendant United Services Automobile Association (USAA) appeals as of right the trial court's July 1, 2010 order granting defendants/counter-plaintiffs Spectrum Health Hospitals and Spectrum Health Continuing Care (collectively "Spectrum") penalty interest, and further granting Spectrum and defendants Charles Rimbey and Terry Park, parents and co-guardians of Rana Reyes, a legally incapacitated person, attorney fees in this action involving personal protection (PIP[1]) benefits under the no-fault act, MCL 500.3101, *et seq*. For the reasons set forth in this opinion, we affirm.

[1] "What are commonly called 'PIP benefits' are actually personal protection insurance (PPI) benefits by statute. MCL 500.3142. However, lawyers and others call these benefits PIP

I. FACTUAL BACKGROUND AND LOWER COURT PROCEEDINGS

In the early morning hours of November 16, 2008, Rana Reyes was severely injured when she intentionally exited a moving vehicle driven by Gabriel Tagg, after becoming emotional because Tagg did not reply in kind when Reyes told him that she loved him. Tagg and Reyes had been in a dating relationship for the preceding six months, although there was evidence that Tagg had taken measures to denounce that relationship a few days previous. During the evening and night of November 15, 2008, Tagg and Reyes joined friends at a local establishment to celebrate Reyes's birthday. The couple engaged in intimacy in Tagg's vehicle before entering the bar. Once inside the bar, Reyes began drinking alcohol. She consumed a substantial amount of alcohol over the course of the evening, and, on more than one occasion, Reyes told Tagg that she loved him. Tagg did not reply in kind. Reyes became "drunkenly emotional" on more than one occasion as a result and had to be calmed by her sister, Leah Rimbey, who advised Reyes that it was apparent that Tagg was interested in her. Then, as Tagg and Reyes were returning to Tagg's residence, Reyes confronted Tagg about his failure to reciprocate her expressions of love for him. Tagg again declined to tell Reyes that he loved her. Reyes became emotional and began saying that she needed to "get out of" the vehicle. Tagg did not feel it was safe to let Reyes out of the vehicle in her intoxicated state, because they were "in the middle of nowhere." Instead, he attempted to calm Reyes and he advised her that she "just need[ed] to go home and sleep this off." As they were travelling along the roadway, at a speed of 35 to 45 miles per hour, Reyes again said "I need to get out of here," opened the door and exited the moving vehicle. Reyes was struck by the rear passenger tire, suffering a significant closed head injury.

Plaintiff was notified of Reyes's injuries on November 19, 2008 by its insured, Reyes's estranged husband, who advised plaintiff that Reyes had fallen out of a vehicle and that the details of the incident were under investigation. Plaintiff provided its insurer with materials to request personal protection benefits for Reyes under the no-fault act. Plaintiff received its first bills from Spectrum for Reyes's treatment on December 9, 2008; Spectrum's Care Management Assessment, prepared based on information obtained from Tagg and Rimbey at the time of the accident, advised that "[t]he full details surrounding the event remain unclear, however, it does appear that the [patient] may have intentionally tried to harm herself." Additional information in the form of newspaper articles and the traffic crash report of the accident indicated that Reyes had intentionally opened the passenger door of Tagg's vehicle. On December 19, 2008, plaintiff became aware of a newspaper article reporting that Reyes "likely jumped from a moving vehicle during a dispute with her boyfriend." Then, during a telephone interview of Tagg, plaintiff became aware of Reyes's statement that she needed to exit the vehicle, and of the context in which she made that statement, including her emotional response to Tagg's failure to reciprocate her expressions of love for him. Tagg also indicated to plaintiff's representative that Reyes had told him previously that she was a "cutter" and that Reyes was aware of what she was doing when she opened the door and jumped from his vehicle.

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benefits to distinguish them from property protection insurance benefits." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66 n 4; 737 NW2d 332 (2007).

Concluding that the information provided to it raised a question as to whether Reyes's injuries were suffered accidentally so as to warrant coverage under the no-fault act, plaintiff retained an investigator to obtain statements from Reyes' family members and others with information pertinent to the determination of whether Reyes may have intended to harm herself by intentionally exiting Tagg's moving vehicle. The investigator determined that Tagg had changed his relationship status on Facebook to reflect that he was single three days before Reyes's birthday, that Rimbey had indicated in response that Reyes' was unhappy about this, that Tagg had stated in a written statement that Reyes was very upset in the last hours they were at the bar, and that a deputy had written in a report that Rimbey stated that she thought that Reyes had done this for "the attention." Plaintiff's investigator attempted to interview Reyes's family, to determine whether they had any information to suggest that Reyes may have intended to harm herself by jumping from Tagg's vehicle. However, Reyes's family members declined to cooperate with the investigation. Thereafter, plaintiff filed the instant action for declaratory judgment seeking determination of its liability for providing PIP coverage to Reyes. With legal action pending, plaintiff was able to depose Tagg and Reyes's family members. Shortly after the completion of that discovery, on December 16, 2009, plaintiff determined that reasonable proof of loss appeared to warrant the payment of the claim, and, on January 22, 2010, plaintiff tendered full payment to Spectrum for the medical treatment provided to Reyes.

Spectrum moved for the recovery of penalty interest under MCL 500.3142 and for an award of attorney fees under MCL 500.3148(1); defendants Charles and Park likewise moved for costs and attorney fees. The trial court granted these motions, concluding that by December 12, 2008, plaintiff had reasonable proof of the fact and of the amount of the loss sustained and that plaintiff's decision to delay payment had been unreasonable. The trial court rejected plaintiff's assertion that there was a bona fide factual dispute as to whether Reyes's injury was accidental, determining that Reyes's statement before opening the vehicle's door did not indicate a subjective intent to injure herself, but rather was simply an indication that she wanted to exit the vehicle, and concluding that plaintiff did not have any evidence that Reyes intended to injure herself when she intentionally exited Tagg's moving vehicle.

II. STANDARDS OF REVIEW

This Court reviews de novo both a trial court's decision on a motion for summary disposition and any attendant questions of law or issues of statutory interpretation. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When interpreting statutes, the primary goal is to give effect to the intent of the Legislature. Thus, this Court will review the language of the statute itself and give the words used by the Legislature their common and ordinary meaning. If the statutory language is unambiguous, this Court must presume that the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted. *Moore*, 482 Mich at 517, quoting *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). "This Court reviews for clear error a trial court's finding whether a communication qualifies as reasonable proof of the fact or amount of a claim." *Williams v AAA Mich*, 250 Mich App 249, 265; 646 NW2d 476 (2002). This Court reviews a trial court's decision whether to award attorney fees and under the no-fault act for an abuse of discretion. *Moore*, 482 Mich at 516. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472

(2008). However, "[t]he trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether [a] defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Moore*, 482 Mich at 516, quoting *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). This Court reviews a trial court's factual findings for clear error. *Moore*, 482 Mich at 516. A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Moore*, 482 Mich at 516, quoting *Ross*, 481 Mich at 7.

III. PENALTY INTEREST UNDER MCL 500.3142

The no-fault act provides that "[PPI] benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained, MCL 500.3142(2), and that "[a]n overdue payment bears simple interest at the rate of 12% per annum," MCL 500.3142(3). Consequently, a claim for PPI benefits for an insured should be paid "within thirty days of defendant's receipt of reasonable proof of the medical services provided and the cost of such services." *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 39; 645 NW2d 59 (2002).

Plaintiff argues that, contrary to the trial court's finding, it did not have reasonable proof of the fact and of the amount of the loss as early as December 12, 2008, because the evidence available to it reflected that Reyes may have intended to harm herself when she intentionally exited Tagg's moving vehicle. Accordingly, plaintiff argues that the trial court's award of penalty interest must be reversed. However, as this Court has indicated, "[p]enalty interest *must be assessed* against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, *irrespective of the insurer's good faith in not promptly paying the benefits*." *Williams*, 250 Mich App at 265 (emphasis added). Consequently, once reasonable proof of injuries and losses is received, the insurer bears liability for statutory interest on any payments that become overdue. *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 716; 450 NW2d 40 (1990). To reiterate, "an insurer's good faith in withholding payment of benefits . . . is irrelevant to liability under the penalty interest statute." *Davis v Citizens Ins Co of America*, 195 Mich App 323, 329; 489 NW2d 214 (1992).

We conclude that the trial court did not clearly err when it determined that plaintiff was provided with reasonable proof of the fact and of the amount of the loss by December 12, 2008. *Williams*, 250 Mich App at 265. The record establishes that by that date plaintiff knew that Reyes had been injured in an incident involving a motor vehicle plaintiff also knew it was the responsible insurer and that Spectrum was providing medical care to Reyes. The record also reveals that by December 12, 2008, plaintiff had received Spectrum's treatment records and its first billing invoices. Despite any initial question as to whether coverage might be excluded, plaintiff ultimately determined that it was liable for the payment of the claim. Consequently, because any good faith by plaintiff in withholding payment is wholly irrelevant to the award of penalty interest, the trial court did not clearly err by determining that benefits were overdue as of January 12, 2009, and awarding Spectrum penalty interest accordingly. *Williams*, 250 Mich App at 265; *Davis*, 195 Mich App at 329; *Grossheim*, 181 Mich App at 716.

Plaintiff also argues that the amount of penalty interest awarded to Spectrum should be reduced on the basis that Spectrum was not entitled to recover penalty interest for the period of time in which it was in receipt of a conditional payment for a portion of its charges for Reyes's care from Reyes's health insurer, Tricare. Plaintiff points to this Court's decision in *Williams*, 250 Mich App at 268-269, in support of its assertion that the full amount of Spectrum's charges were not "incurred" under the statute during the time period that Spectrum held the payment from Reyes's health insurance company. In *Williams*, we addressed whether charges above those paid by the injured party's health insurer provider, were "incurred," concluding that

> [t]he satisfaction of plaintiff's medical bills by BCBSM [Blue Cross and Blue Shield of Michigan] through payment of less than the amounts charged by the providers relieved plaintiff of any responsibility or legal obligation to pay the providers further amounts exceeding those proffered by BCBSM and accepted by plaintiff's health care providers. Because plaintiff bears no liability for the full medical service amounts initially charged by his health care providers, he has not *incurred* these full charges. [*Id*. at 269.]

However, this conclusion was based on the fact that once plaintiff insured's medical bills were paid by his health insurer in an amount agreed to by his health care providers, plaintiff insured had "no liability for the full medical service amounts initially charged by [the insured's] health care providers." *Id*. Such is not the case here as plaintiff insured bears legal responsibility under the no-fault act for the full cost of Reyes's medical treatment by Spectrum. This obligation exists irrespective of any agreement between Spectrum and a health insurance provider to accept lesser amounts in cases where the health insurer bears responsibility for payment of bills for medical treatment rendered to its insured(s) by Spectrum.

In this case, the trial court awarded Spectrum penalty interest on the full amount of PPI benefits, excepting the amount paid by Tricare for the period of time that Spectrum held those funds. As previously noted, despite plaintiff's assertions to the contrary, Spectrum's acceptance of Tricare's partial payment does not alter the fact that plaintiff's payment to Spectrum for the full amount of services provided to Reyes was overdue under the no-fault act. Nor do Spectrum's actions mitigate plaintiff's statutory mandate set forth in MCL 500.3142(3), which states, in relevant part: "[a]n overdue payment bears simple interest at the rate of 12% per annum." Accordingly, we conclude that the trial court correctly calculated the amount of penalty interests owed to Spectrum under the statute.

IV. ATTORNEY FEES UNDER MCL 500.3148

The no-fault act provides for an award of reasonable attorney fees whenever an insurer unreasonably withholds benefits. Specifically, MCL 500.3148 provides that:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, *if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment*. [Emphasis added.]

Thus,

> MCL 500.3148(1) establishes two prerequisites for the award of attorney fees. First, the benefits must be overdue, meaning '"not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). Second, in postjudgment proceedings, the trial court must find that the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." Therefore, assigning the words in MCL 500.3142 and MCL 500.3148 their common and ordinary meaning, attorney fees are payable only on overdue benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying." *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003) (emphasis omitted). [*Moore*, 482 Mich at 517.]

"The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured." *Ross*, 481 Mich at 11. Accordingly, when benefits initially denied or delayed are later determined to be payable, "a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). When an insurer refuses or delays payment of PIP benefits, it has the burden of justifying its refusal or delay under MCL 500.3148(1). *Ross*, 481 Mich at 11. A refusal to pay or a delay in payment "is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Attard*, 237 Mich App at 317; see also *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987); *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103, 527 NW2d 524 (1994). The determinative factor "is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable." *Ross*, 481 Mich at 11. Thus, contrary to the award of penalty interest, "an insurer's good faith in withholding payment of benefits is relevant in awarding attorney fees under the act." *Davis*, 195 Mich App at 329.

As asserted in the trial court, plaintiff argues there was a legitimate factual uncertainty as to whether Reyes intended to injure herself by jumping from Tagg's moving vehicle. Plaintiff contends this factual uncertainty was sufficient evidence to preclude coverage for the resulting loss prior to its completion of discovery in November 2009. The trial court concluded otherwise, finding that plaintiff had no evidence that Reyes intended to injure herself, and thus, plaintiff's delay in paying PIP benefits was unreasonable.

The no-fault act provides PIP benefits for "accidental bodily injury arising out of the . . . use of a motor vehicle," and it defines accidental bodily injury as injury not "suffered intentionally by the injured person or caused intentionally by the claimant." MCL 500.3105. Thus, "the no-fault act does not cover injuries caused intentionally." *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 18; 684 NW2d 391 (2004). "One acts intentionally if he intended both the act *and* the injury. The subjective intent of an actor is the focus of determining whether the actor acted intentionally." *Miller v Farm Bureau Ins Co*, 218 Mich App 221, 226; 553 NW2d 371 (1996). Whether an insured intended to injure himself may be inferred from the facts surrounding his actions. *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 201-202; 536 NW2d 784 (1995).

In awarding attorney fees, the trial court held, in relevant part:

> For plaintiff's denial to be reasonable, it would have to show there was evidence, and not merely conjecture and speculation, that Rana subjectively intended to injure herself. Evidence that Rana intentionally left the vehicle is insufficient for the intentional act exclusion to apply; instead, there must be evidence that Rana intended the injury itself . . . Yet plaintiff did not have evidence that Rana intended to injure herself . . .
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> The Court acknowledges that people do not generally leave moving vehicles, but occasionally they do, and they do so without intending to injure themselves . . . The Court also notes that mental illness alone is insufficient to create a question of fact whether a person intended her injuries . . . So the fact that Rana suffered from depression is insufficient to create a question of fact whether she intended the injuries.
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> Here, the only eyewitness to the event, Tagg, explained to plaintiff's employees on December 22, 2008 that he had no indication that Rana was going to leave the car until she did so; it was 'instant movement.' On January 6, 2009, he explained that he was driving Rana home and she was highly intoxicated. As they were riding, Rana said, 'I can't believe you didn't tell me that you loved me back.' Then she said, "I've got to get out of here' once or twice, opened the door, and fell out. Tagg never indicated that Rana stated that she wished to hurt herself before she left the vehicle, even though he was under investigation at the time of the first conversation . . .
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> Although a court must judge the reasonableness of the denial at the time of the denial, the Court notes that plaintiff's initial investigation completed in February 2009 confirmed, via interviews with family members and Tagg, that Rana was not suicidal but happy, and had not attempted suicide in the past. The Court also notes that there is nothing in the record to show that plaintiff ever asked for what it deemed was lacking, and in fact, on October 28, 2009, at her deposition Koehn could not say what evidence plaintiff needed or would accept as reasonable proof that the injury was accidental. Finally, the Court notes that plaintiff chose to delay deposing witnesses for many months after it filed suit, which significantly lengthened the delay in payment . . .

The parties argued below as well as here that this Court's determination of whether there existed a legitimate factual uncertainty as to whether Reyes intended to injure herself by jumping from Tagg's moving vehicle rests on whether the facts presented here are more in line with our prior decisions in *Schultz*, 212 Mich App 199; or *Amerisure*, 262 Mich App 10. However, our analysis of the trial court's determination in this matter is guided by our standard of review. As previously stated, the trial court's decision whether the insurer acted reasonably involves a mixed question of law and fact. Further, whereas our review of the issue of whether plaintiff had a legitimate factual uncertainty and thus acted reasonably creates a question of law, whether plaintiff's denial of benefits was reasonable under the particular facts of the case is a question of fact. This Court reviews a trial court's factual findings for clear error. *Moore*, 482 Mich at 516.

Unlike the trial courts in *Schultz* and *Amerisure*, the trial court in this case had a thorough understanding of the applicable law on the issue of attorney fees and applied all relevant facts to corresponding precedent. Such a finding negates error in the trial court's findings of law. As reiterated above, the trial court made detailed findings as to whether plaintiff acted reasonably in this matter when determining whether the injury was intentional. The trial court noted that under *Ivezaj v Auto Club Ins Assoc*, 275 Mich App 349, 353; 737 NW2d 807 (2007), a rebuttable presumption "arises that this refusal to pay or delay in paying is unreasonable." See also, *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). The trial court then proceeded to the record for evidence possessed by plaintiff that Rana intended the injury. After exhaustive review, the trial court was unable to find evidence that plaintiff possessed relative to an intentional injury. Rather, all the trial court and this Court are able to ascertain is that plaintiff's refusal to pay was based "on the fact that Rana jumped from a moving vehicle and generally, people do not leave moving vehicles unless they intend to injure themselves . . . ." While reasonable minds may differ on the question of whether injury is intended by someone voluntarily leaving a moving motor vehicle, our decision may not rest on our subjective convictions on the subject of the norms of human behavior. Rather, our decision must rest on whether the trial court's factual determinations leading to its ultimate legal conclusions constituted clear error.

In making that determination, we note that the trial court took into consideration all evidence available to plaintiff regarding Rana's mental state and corresponding testimony from those who were with Rana on the date of the incident. The trial court made extensive use of the record evidence provided by the only eyewitness to the incident. Furthermore, the trial court also found that when queried, representatives of plaintiff could not proffer what evidence plaintiff needed as proof that the injury was accidental. Lastly, the trial court found that much of the delay in payment was due to plaintiff's decision to delay deposing witnesses. Thus, the trial court held that plaintiff had failed to rebut the presumption under *Ivezaj*, 275 Mich at 353. After review of the trial court's opinion and the record evidence presented, we do not possess a definite and firm conviction that a mistake has been made. *Moore*, 482 Mich at 516. Accordingly, we affirm the trial court on the award of attorney fees in this matter.

Affirmed. Defendants having prevailed, may access costs. MCR 7.219(A).

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello